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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of)	
PETITION TO AMEND)	Supreme Court No. R-__
ARIZONA RULES OF)	Petition to Amend Arizona Rules
FAMILY LAW PROCEDURE)	of Family Law Procedure
_____)	

Pursuant to Rule 28, Rules of the Supreme Court, Barbara Atwood and Timothy Berg, Commissioners with the Uniform Law Commission, respectfully petition this Court to adopt amendments to the Arizona Rules of Family Law Procedure (ARFLP) to implement the Uniform Collaborative Law Rules (UCLR or “Rules”), as set out in Appendix A. We recommend that the proposed rules be inserted in the ARFLP as a new Rule 67.1.

1. BACKGROUND

Collaborative law is a voluntary, client-driven form of alternative dispute resolution practiced in all 50 states, primarily in the family law realm. Unlike mediation or traditional negotiation, the collaborative law process involves an agreement between clients and their lawyers that the lawyers will represent the clients solely for the purposes of settlement and that the clients will hire new counsel if the case does not settle. By agreement, the attorneys are disqualified from further work and must withdraw from the representation. The disqualification provision, with its obvious incentive for clients and lawyers to reach settlement, is the hallmark of collaborative law. *See generally* Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 Ariz. L. Rev. 289 (2008).

Practitioners of collaborative law view the process as an important, useful, and cost-effective option for amicable, non-adversarial dispute resolution. Furthermore, the American Bar Association has concluded that collaborative law is a permissible “limited scope representation” and the disqualification provision does not impair the lawyer’s ability to ethically represent the client. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447, 3 (2007). The ABA opinion emphasized that informed consent from the client is essential. *Id.* at 3-4.

At least eight state bar ethics committees have issued opinions on the ethical propriety of collaborative law practice, with all but one concluding that a lawyer may ethically participate in a collaborative law agreement, provided the client is full advised about the consequences of the limited scope of representation.¹ The one bar association that took a different view concluded that the withdrawal and disqualification requirement at the core of collaborative law created an inherent conflict of interest for the lawyer.² That view was specifically rejected by the ABA:

When a client has given informed consent to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation.³

¹ Alaska Bar Ass'n Ethics Comm., Ethics Op. 2011-3 (2011), 2011 WL 2410519; S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 10-01 (2010), 2010 WL 3620179; Advisory Comm. of the Supreme Court of Mo., Formal Op. 124 (2008), 2008 WL 6014025; Ky. Bar Ass'n, Ethics Op. E-425 (2005); Washington State Bar Ass'n, Informal Op. 2078 (2004); N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005), 2005 WL 3890576; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24, 3-5 (2004), 2004 WL 2758094; N.C. State Bar Ass'n, 2002 Formal Ethics Op. 1 (2002).

² Ethics Comm. Of the Colo. Bar Ass'n, Ethical Op. 115 (2007).

³ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, 3-4 (2007).

The ABA noted that “[a] client’s agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence.”⁴

In Arizona, the practice of collaborative family law has a strong following among family law attorneys, with the first collaborative law group forming as early as 2001. *See* Natalie Wright, *Collaborative Divorce Practice – A Revolution in Family Law*, 44 Ariz. Att’y 36 (2008). At the same time, critics of the collaborative law process have voiced concerns about the disqualification provision and the lack of adequate regulation and screening mechanisms to protect clients. *Id.* at 37. In light of the increased use of collaborative law methods in Arizona, the Uniform Collaborative Law Rules would provide needed guidance throughout the collaborative law process.

With collaborative law practice on the rise, the Uniform Law Commission in 2006 began developing a comprehensive regulatory framework for this unique form of alternative dispute resolution. Representatives from state bars, collaborative attorney groups, litigators, domestic violence coalitions, and state courts all participated in the drafting of the Uniform Collaborative Law Act (UCLA), as did representatives from the family law, dispute resolution, and litigation sections of the American Bar Association.

⁴ *Id.*

The UCLA was promulgated in 2009 as a proposed legislative enactment for states. The Uniform Law Commission amended the Act in 2010 to provide a version suitable for adoption by court rule – the UCLR – because of concerns that legislative regulation of lawyers and dispute resolution would raise separation of powers concerns in many states. *See Uniform Collaborative Law Rules and Uniform Collaborative Law Act*, 48 Fam. L. Q. 55, 86-87 (2014). The Act and the Rules are drafted to permit states to decide whether to authorize collaborative law broadly for all civil disputes or to limit the application to the family law realm. *See id.* at 111-16. This Petition takes the narrower approach, recommending that the collaborative law rules be adopted for family law dispute resolution since that is where collaborative law has had its most profound impact.

The UCLR standardizes the most important features of the collaborative law process and provides ethical directives for attorneys and protections for clients. It also provides directives governing the disclosure of information and evidentiary privilege. The Rules provide clarity, allowing parties and counsel to consistently rely on a codified privilege governing communications during a collaborative law process. Importantly, the Rules also give guidance to attorneys in determining whether collaborative law is appropriate for a particular dispute or client.

Since its promulgation, the UCLA has been enacted in eleven jurisdictions: Alabama, District of Columbia, Hawaii, Maryland, Michigan, Nevada, New

Jersey, Ohio, Texas, Utah, and Washington.⁵ The Act was introduced in 2014 in Florida, Illinois, Massachusetts, Oklahoma, and South Carolina.⁶ As the momentum continues across the United States, the resulting uniformity in standards will benefit the public and the legal profession. *See* Andrew Schepard & David A. Hoffman, *Regulating Collaborative Law – The Uniform Collaborative Law Act Takes Shape*, 17 Disp. Resol. Mag. 26 (2010).

The UCLR at its core is a regulation of the attorney-client relationship and therefore falls within the broad authority of this Court over the practice of law. Rule 31, Rules of Arizona Supreme Court. Because collaborative law is a form of limited scope representation (where an attorney is retained solely for the purpose of reaching a settlement and expressly not for the purpose of litigation), clear rules about the mechanics of the practice will help both attorneys and clients. We propose the adoption of the UCLR by the addition of new Rule 67.1 to the ARFLP, appropriately situated within Chapter VII, Settlement and Alternative Dispute Resolution.⁷

⁵ An update on legislative activity for the UCLA can be found at <http://www.uniformlawcommission.org/Acts.aspx>. The UCLA with full commentary is also available at that link.

⁶ *See* Uniform Law Commission Legislative Report 2014, *available at* http://uniformlaws.org/Shared/LegReports/LegRpt_State.pdf

⁷ If the Court were to adopt the UCLR as a free-standing Title in the ARFLP, the numbering and lettering of the proposed amendments would change accordingly.

2. PURPOSE OF THE PROPOSED AMENDMENT

In addition to the general observations above, the Uniform Collaborative Law Rules would be a valuable addition to the ARFLP for the following more specific reasons.

The UCLR would establish minimum requirements for collaborative law participation agreements to ensure the presence of informed consent. The agreements must be in writing, must state the parties' intention to resolve their dispute through the collaborative process, and must designate the collaborative lawyers.

The disqualification requirement, the touchstone of the collaborative process, is spelled out with clarity in the UCLR. Significantly, the Rules modify the disqualification rule for lawyers representing low income clients or government parties. Under the Rules, legal aid offices, firms providing pro bono services, and law school clinics may continue to represent low income clients even if the collaborative process fails.

The UCLR further protects client through a screening requirement. The Rules direct lawyers to advise clients about alternatives for dispute resolution (such as litigation, arbitration, and mediation), mandates that lawyers screen for instances of domestic violence or other coercive behavior, and requires the lawyer to assess

with the prospective client whether a collaborative law process is appropriate for the case.

Finally, clarifying an evidentiary question that has arisen in the collaborative law process, the UCLR creates a privilege for communications that occur during the collaborative law process that would otherwise not be available, or would vary when a dispute crosses state lines.

3. CONTENT OF PROPOSED AMENDMENT

The proposed Uniform Collaborative Law Rules are set out in Appendix A, as a new Rule 67.1, ARFLP.

RESPECTFULLY SUBMITTED this 9th day of January 2015.

Uniform Law Commission

By: /s/ Timothy Berg
Barbara Atwood
Timothy Berg